IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1058 OF 1989

Punjab & Sind Bank .. Plaintiffs.

Versus

Amardhan Chemical Industry & Ors. .. Defendants.

Mr.Kirit H.Mody i/b.Haridas & Co.for plaintiffs.

Mr.Manoj N.Nikose i/b.N.G.Bhat for defendants.

Mr.M.V.Indurkar, Gen.Manager of Plaintiffs Bank present.

CORAM : A.M.KHANWILKAR, J.

DATE : 29th September, 2007.

P.C.:

1. This suit is filed for recovery of sum of Rs.74,841.30 along with interest @19% per annum from the date of filing of the suit till the date of repayment and or realisation. The Plaintiffs Bank extended the financial facility of bill purchase / discounting to Defendant No.1. The Defendant No.1 is a partnership firm. The Defendant Nos.2 to 4 at the relevant times were partners of the Defendant No.1. The Defendant No.5 is the

transporter. Pursuant to an application made by the Defendant No.1, the Plaintiffs extended the said bill purchase / discounting facility to Defendant No.1. The Plaintiffs discounted in favour of the Defendant Nos.1 to 4, Bill of Exchange for a sum of Rs.51,373.80 dated 8th March, 1983, for a valuable consideration in favour of Defendant No.1. However, upon presentation of the said bill of exchange, it was not honoured. The Plaintiffs called upon the Defendant No.1 to pay the said amount of bill of exchange along with interest @20% per annum. In a letter dated 14th October, 1983, addressed by the Defendants to the Plaintiffs, the Defendant No.1 undertook to pay sum of Rs.51,373.80 on or before 18th October, 1983. It is the case of the Plaintiffs that inspite of acknowledgement of liability and assurance to pay the amounts, the Defendant Nos.1 to 4 failed and neglected to pay the outstanding amount alongwith the interest thereon. In the circumstances, reminders were sent to the Defendant Nos.1 to 4 from time to time which were of no fruitful outcome.

2. It is the Plaintiffs' case that the Defendant Nos.1 to 4 expressed their inability to pay the amount mentioned in the Promissory Note. The Defendant Nos.1 to 4 executed On Demand Promissory Note in favour of the

Plaintiffs, undertaking jointly and / or severally to pay the amount alongwith the interest as stated in the Agreement subject to a minimum rate of interest being 17.5% per annum. Besides executing On Demand Promissory Note, the Defendant Nos.1 to 4 also executed other documents acknowledging their liability to pay the principal amount as also penal interest @2.5% per annum in addition to the rate normally payable. The Plaintiffs on 26th November, 1986, called upon the Defendants to pay amount of Rs.51,373.80 alongwith interest and other charges within 7 days but of no avail. It is the case of the Plaintiffs that since they were holding original consignment copy unpaid on their records with their name thereon as the consignee and that of the consignor M/s.Hemantkumar Pareshkumar & Co., Bombay, the Plaintiffs by their letter dated 28th November, 1986, addressed to the Defendant No.5 called upon the Defendant No.5 to let the Plaintiffs know about the whereabouts of the goods. It was stated in the said letter that if the goods were lying with the Defendant No.5, they should be re-booked to the Plaintiffs at Bombay immediately, failing which the Defendant No.5 would be held responsible to reimburse the Plaintiffs' amount of Rs.51,373.80 alongwith interest and other charges. As there was no response from the Defendant No.5 to this letter, eventually, Plaintiffs sent

legal notice on 28th March, 1987, followed by another legal notices dated 28th February, 1988, 14th March, 1988 and ultimately dated 20th January, 1989. Inspite of legal notices, the Defendants did not repaid the outstanding amount, for which the present suit has been filed for the following relief :-

> "a) That the Defendant Nos.1 to 4 be jointly and/or severally and the Defendant No.5 be ordered and decreed to pay to the Plaintiffs the said sum of Rs.74,841.30 alongwith interest at the rate of 19% per annum from the date of the filing of the suit till the date of repayment and/or realisation as also the costs of and incidental to the suit."

3. The Defendant Nos.1 to 5 were duly served and entered appearances and have also filed their respective written statements. The Defendant Nos.1 to 4 have filed joint written statement, whereas the Defendant No.5 has filed separate written statement. In substance, the Defendants denied their liability to pay the amount as claimed by the Plaintiffs. On the basis of pleadings, this Court under Order dated 31st August, 2007, framed issues when the matter was notified for framing issues. None appeared for the Defendants. Nevertheless, on the

basis of affidavits, issues were settled and framed which reads thus :-

i) Whether the Plaintiffs prove that they are entitled to recover from the Defendants a sum of Rs.74,841.30 ps. (Rupees Seventy four thousand eight hundred forty one and paise thirty only) with interest at the rate of 19% per annum?

ii) Whether the Defendants prove that the suit is barred by the Law of Limitation as alleged in Para 1 of the Written Statement?

iii) Whether the Defendants prove that they have already paid principal amount of Rs.51,373.80 ps. as alleged in Para 2 of the Written Statement?

iv) Whether the Defendants prove that the Plaintiffs have taken their signature on blank printed Promissory Note as per their usual practice and thereafter filled up the date, amount etc. as alleged in Para 6 of the Written Statement?

v) Whether the Defendants prove that they were made to sign Promissory Note under duress as alleged in Para 6 of the Written Statement?

vi) Whether the Defendants prove that the letter dated 6.3.1986 Ex."C" to the plaint was procured by the Plaintiffs under duress as alleged in Para 6 of the Written Statement?

vii) To what reliefs the Plaintiffs are entitled."

4. As issues were framed and the matter was required to proceed for recording of evidence, the Plaintiffs tendered affidavit in lieu of examination-in-chief as well as compilation of original documents. The Plaintiffs' witness made himself available for cross examination on that date itself. However, the matter was directed to be placed for recording of evidence on 6th September, 2007. In spite of notice, the Defendants have not chosen to appear when the matter was notified for recording of evidence on 6th September, 2007. The Plaintiffs' witness entered the witness box and reiterated the contents of his affidavit which is filed in lieu of examination-in-chief. He also proved the relevant documents on which the

Plaintiffs were relying to establish the case made out against the Defendants being documents marked as Exhibits "B-1" to "B-12" respectively. However, as none appeared for the Defendants, the recording of cross-examination could not proceed further. The Plaintiffs closed their evidence. The witness was, therefore, discharged as the Plaintiffs did not intend to examine any other witness in support of their case, the suit was placed for arguments today. Once again today, when the matter is called out, none appears for the Defendants. In the circumstances, I am disposed of to proceed in the matter on the basis of evidence already on record.

5. Out of the seven issues which are framed, the issue at serial numbers 2 to 6 are required to be proved by the Defendants. The Defendants, however, have not chosen to appear after filing of the written statements. No evidence has been adduced on behalf of the Defendants in support of their claim. In that sense, those issues will have to be answered against the Defendants.

6. Insofar as issue No.2 is concerned, that issue will have to be considered by the Court on its own, in view of Section 3 of the Limitation Act. From the pleadings on record and the evidence adduced by the

Plaintiffs, it is seen that the Defendant Nos.1 to 4 acknowledged their liability to pay sum of Rs.51,373.80 by executing On Demand Promissory Note dated 6th March, 1986. The present suit, however, is filed on 4th March, 1989, which is, therefore, within limitation. The Defendant Nos.1 to 4 not only acknowledged their liability to pay the principal amount but also minimum interest @ 17.5% per annum as also penal rate of interest @2.5% per annum in addition to the normal rate of interest payable. Suffice it to observe that it is not possible to take a view that the suit is barred by Law of Limitation.

7. The only issue that requires to be considered is issue No.1. Issue No.1 requires the Plaintiffs to prove that they are entitled to recover from the Defendants a sum of Rs.74,841.30 alongwith interest @19% per annum. This issue will have to be answered in favour of the Plaintiffs having regard to the pleadings and in particular, the oral and documentary evidence produced by the Plaintiffs which has remained uncontroverted. The Plaintiffs in the evidence of Plaintiffs' witness has spelt out the nature of agreed transaction between parties and the undertaking given by the Defendant Nos.1 to 4 to honour the bill of exchange. Inspite of such assurances, the Defendant No.1 failed to make payment in respect of

bill of exchange when presented. The fact that the Defendant Nos.1 to 4 acknowledged the liability to pay the suit amount to the Plaintiffs is established from the documents signed by the Defendants Exhibit-"B-1" which is a letter dated 14th October, 1983, sent by the authorised signatory of Defendant No.1 to the Plaintiffs. The Plaintiffs have also brought on record relevant correspondence to establish the fact that the Defendants admitted the liability, more importantly, the Plaintiffs have proved the On Demand Promissory Note dated 6th March, 1986, which is duly executed by the Defendants, acknowledging the liability to pay the requisite amount along with minimum rate of interest of 17.5% per annum. The Plaintiffs have also proved the document Exhibit-"B-5" which is issued by the Defendant No.1 duly signed by the Defendants, agreeing to pay penal rate of interest upto 2.5% per annum in addition to the rate normally payable on the loan / advance in terms of the Agreement executed between the parties on account of default or delay. From the oral and documentary evidence on record, there is no doubt that the Plaintiffs have proved that the Defendant Nos.1 to 4 are liable to pay the suit amount alongwith interest as per the agreed terms.

8. Insofar as the Defendant No.5 is concerned, the

liability of Defendant No.5 is joint or several alongwith the Defendant Nos.1 to 4. The Defendant No.5 inspite of legal notice sent to him neither re-booked the goods to the Plaintiffs nor paid the amount under the Bill of Exchange to the Plaintiffs. The Defendant No.5, therefore, was jointly and severally liable alongwith the Defendant Nos.1 to 4. That case made out by the Plaintiffs is established from the evidence both oral and documentary produced by the Plaintiffs.

9. In the substance, the Plaintiffs ought to succeed in getting decree against the Defendants in terms of prayer clause (a). Inasmuch as, the Plaintiffs have not only established the fact that the Defendant Nos.1 to 4 have acknowledged the liability to pay the suit claim alongwith interest; but also the fact about the failure of Defendants to repay that amount. There is nothing on record to indicate that after institution of the suit any amount has been repaid, either in whole or portion thereof to the Plaintiffs. It is also established from the record that the Defendant No.1 admitted his liability to pay minimum rate of interest @17.5% per annum and additionally @2.5% towards penal interest for delayed payment. The Plaintiffs, however, are claiming interest @19% per annum only, which is less than the agreed rate of interest.

Besides, the transaction between the parties was commercial transaction, the Plaintiffs would be entitled for interest on the principal amount @19% per annum from the date of institution of the suit till the date of repayment and or realisation as prayed.

10. Accordingly, the suit is decreed in terms of prayer clause (a) with costs which reads thus :-

> "a) That the Defendant Nos.1 to 4 be jointly and / or severally and the Defendant No.5 be ordered and decreed to pay to the Plaintiffs the said sum of Rs.74,841.30 alongwith interest at the rate of 19% per annum from the date of filing of the suit till the date of repayment and / or realisation as also the costs of and incidental to the suit."

11. Decree be drawn up accordingly.

(A.M.Khanwilkar, J.)